

DISCIPLINARY ACTION

Private Admonition - Board Case No. 16, 2003. Date of Sanction: October 31, 2003.

A panel of the Preliminary Review Committee of the Board on Professional Responsibility offered a private admonition to a lawyer as a result of its finding that there was probable cause to conclude that the lawyer's conduct in an estate matter had violated Rules 1.3 and 8.4(c) of the Delaware Lawyers' Rules of Professional Conduct ("Rules"). The lawyer accepted the private admonition and admitted violating Rule 1.3, by failing to conduct an independent evaluation of a testator's competence and capacity for undue influence in signing his final estate documents, and Rule 8.4(c), by falsely notarizing the testator's signature on his trust document.

This matter came to the attention of the ODC by a letter from the lawyer who, in preparing for the lawyer's own deposition in connection with litigation in an estate matter, became concerned about the notarization of a trust document outside the testator's presence. The lawyer was the long time attorney for the testator. The testator had remarried in 1985. Over many years, the lawyer drafted pre-nuptial agreements, wills, and several estate documents for the couple. The lawyer took direction from the testator. Over time the testator began relying increasingly on his son to assist him with his estate matters. From 2000 forward, the lawyer would often take direction from testator's son, whom the lawyer believed was acting in the testator's best interest, and review all estate matters with the testator prior to finalizing the documents and obtaining the testator's signature thereon.

The last amendment to the testator's estate plan, 2001, resulted in the creation of an Irrevocable Trust naming the son as the trustee, and changes to an existing Revocable Trust for which the testator was the trustee. The son had requested these amendments in February 2001 and the testator died in May 2001. The Irrevocable Trust provided for the testator's wife's needs during her lifetime, should she outlive the testator, with testator's son as the trustee. This Trust was to be funded with significant assets for wife's benefit. The Revocable Trust established a marital trust, which was also funded. The trustee of these trusts was to use the income first in

meeting wife's needs; the trustee had the power to invade the principal to meet those needs.

These documents were forwarded to the testator's son for the testator's review. The son suggested one final change to the Revocable Trust document. The lawyer prepared an amended page for insertion into the trust document. Ten days later, the testator was involved in an automobile accident and was hospitalized. The lawyer scheduled a meeting at the hospital in order to review the documents with the testator and witness his signing of those documents. Upon arrival at the hospital, the lawyer found the testator in a deteriorated physical condition, unable to speak, recognize, or respond to the lawyer in any way. The lawyer found the estate documents already signed by the testator. The testator's son advised the lawyer that the testator had signed the documents in his and his son's presence earlier in the day when he was alert and aware of his surroundings. The lawyer proceeded to witness the testator's signature on both trust documents and notarize the signature on the Revocable Trust document. The lawyer had failed to replace the "changed" page in the Revocable Trust document prior to the testator signing the document. The lawyer subsequently forwarded that page to the testator's son for insertion into that document. The testator shortly thereafter.

Litigation ensued between wife and the testator's son alleging that the son was not upholding his fiduciary duty as trustee of the irrevocable trust and the marital trust and not providing for wife's needs. Furthermore, the litigation alleged that the testator did not have testamentary capacity at the time the final estate documents were signed and he was subject to undue influence to sign the documents. The wife died within eighteen months of the testator. The litigation is currently in settlement negotiations, which will presumably recognize the validity of both of the aforementioned trusts. No action has been instituted against the lawyer for any role in this matter.

The PRC considered the following mitigating factors: absence of a prior disciplinary record; self-report to ODC; full and free disclosure to the disciplinary authorities and cooperative attitude; absence of a dishonest or selfish motive; expressed remorse for the misconduct. In aggravation the PRC considered the lawyer's substantial experience in the practice of law.